(5) (4)

Nos. 89-1433 and 89-1434

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN D. EICHMAN, ET AL.

UNITED STATES OF AMERICA, APPELLANT

v.

MARK JOHN HAGGERTY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE DISTRICT OF COLUMBIA AND THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

MICHAEL R. LAZERWITZ
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

58 pp

QUESTION PRESENTED

Whether the First Amendment prohibits the United States from prosecuting appellees for knowingly burning a flag of the United States, in violation of 18 U.S.C. 700(a), as amended by the Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(a), 103 Stat. 777.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption in *United States* v. *Eichman*, No. 89-1433, David Gerald Blalock and Scott W. Tyler were defendants in the district court and are appellees here.

In addition to the parties named in the caption in *United States* v. *Haggerty*, No. 89-1434, Carlos Garza, Jennifer Proctor Campbell, and Darius Allen Strong were defendants in the district court and are appellees here.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1433

UNITED STATES OF AMERICA, APPELLANT

v.

SHAWN D. EICHMAN, ET AL.

No. 89-1434

UNITED STATES OF AMERICA, APPELLANT

v.

MARK JOHN HAGGERTY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE DISTRICT OF COLUMBIA AND THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court in *Eichman* (89-1433 J.S. App. 1a-18a) is not yet reported. The opinion of the district court in *Haggerty* (89-1434 J.S. App. 1a-16a) is not yet reported.

JURISDICTION

The judgment of the district court in *Eichman* was entered on March 5, 1990. A notice of appeal was filed on March 6, 1990 (89-1433 J.S. App. 20a-21a), and the jurisdictional statement was filed on March 13, 1990. The judgment of the district court in *Haggerty* was entered on February 21, 1990. A notice of appeal was filed on February 23, 1990 (89-1434 J.S. App. 17a-18a), and the jurisdictional statement was filed on March 13, 1990. In each case, the jurisdiction of this Court is invoked under Section 3 of the Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (to be codified at 18 U.S.C. 700(d)). The Court noted probable jurisdiction over the appeals and consolidated them on March 30, 1990. J.A. 85.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part: "Congress shall make no law * * * abridging the freedom of speech * * *."

Section 700 of Title 18, United States Code, as amended effective October 28, 1989, by the Flag Protection Act of 1989, Pub. L. No. 101-131, §§ 1-3, 103 Stat. 777, provides:

> (a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.
>
> (2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

> (b) As used in this section, the term "flag of the United States" means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.
>
> (c) Nothing in this section shall be construed as indicating an intent on the part of Congress to deprive any State, territory, possession, or the Commonwealth of Puerto Rico of jurisdiction over any offense over which it would have jurisdiction in the absence of this section.
>
> (d)(1) An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of subsection (a).
>
> (2) The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible.

STATEMENT

In *Texas* v. *Johnson*, 109 S. Ct. 2533 (1989), this Court held that a state statute outlawing desecration of venerated objects, as applied to the burning of an American flag, violated the First Amendment. That decision raised concerns in the Executive and Legislative Branches over the vitality of an analogous federal provision, 18 U.S.C. 700(a)(1988).[1] In response, Congress amended that statute with the Flag Protection Act of 1989, Pub. L. No. 101-131, §§ 1-3,

---

[1] Former Section 700(a) made criminally liable:

> Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it * * *.

103 Stat. 777. As amended, Section 700(a)(1) eliminates the prior statutory language of "knowingly cast[ing] contempt upon any flag of the United States" and makes criminally liable those persons who, without regard to the content of their expression, physically damage or mistreat a flag of the United States. See pp. 2-3, *supra*.

Shortly after the Flag Protection Act became effective, appellees participated in unrelated demonstrations in Seattle, Washington, and Washington, D.C., and burned several American flags. Appellees were charged in separate criminal informations filed in the District of Columbia and the Western District of Washington with knowingly burning a flag of the United States, in violation of 18 U.S.C. 700(a), as amended by the Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(a), 103 Stat. 777.[2] Relying expressly on *Texas* v. *Johnson*, the district courts dismissed the flag-burning charges, holding that the Flag Protection Act of 1989, as applied to appellees' conduct, violated the First Amendment.

A. *Texas* v. *Johnson*

The defendant in *Texas* v. *Johnson* burned an American flag during a political demonstration in Dallas. He was convicted in Texas state court of desecrating a venerated object, in violation of Tex. Penal Code § 42.09(a)(3) (1974). Under that provision, an individual "commit[ted] an offense if he intentionally or knowingly desecrates * * * a state or national flag," *ibid.*; the statute defined "desecrate" to "mean[] deface, damage, or otherwise

[2] Appellees in *Haggerty* were also charged with one count of willfully injuring property of the United States, in violation of 18 U.S.C. 1361 and 2. J.A. 34; see pp. 16-17, *infra*.

physically mistreat in any way that the actor knows will seriously offend one or more persons likely to observe or discover his action," *id.* § 42.09(b). Johnson contended before the Texas state appellate courts that the First Amendment prohibited his criminal conviction for flag burning. The Texas Court of Criminal Appeals agreed. See *Texas* v. *Johnson*, 109 S. Ct. at 2536-2537.

On June 21, 1989, this Court affirmed that ruling by a sharply divided vote, holding that the Texas statute outlawing desecration of venerated objects, as applied to the burning of an American flag, violated the First Amendment. *Texas* v. *Johnson*, 109 S. Ct. at 2536-2548 (Brennan, J., joined by Marshall, Blackmun, Scalia, and Kennedy, JJ.); *id.* at 2548 (Kennedy, J., concurring); *id.* at 2548-2555 (Rehnquist, C.J., joined by White and O'Connor, JJ., dissenting); *id.* at 2555-2557 (Stevens, J., dissenting).

At the outset, the Court outlined the pertinent analysis:

> We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. If the State's regulation is not related to expression, then the less stringent standard we announced in *United States* v. *O'Brien*, [391 U.S. 367, 377 (1968)], for regulations of noncommunicative conduct controls. If it is, then we are outside of *O'Brien*'s test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard.

109 S. Ct. at 2538 (citations omitted). The Court found that "Johnson's burning of the flag was conduct sufficiently imbued with elements of communication to implicate the First Amendment," *id.* at 2540 (internal quotation marks and citation omitted); the Court thus turned to consider the interests advanced by the State of Texas to support its prohibition against flag burning.

The State first asserted an interest in preventing breaches of the peace. The Court found, however, that "[t]he only evidence offered by the State at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag-burning," 109 S. Ct. at 2541, and thus concluded that the "State's position * * * amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace," *ibid.* The Court rejected that sort of categorical presumption and held that, on the record presented, "the State's interest in maintaining order is not implicated." *Id.* at 2542.

Turning to the State's other asserted interest, "preserving the flag as a symbol of nationhood and national unity," 109 S. Ct. at 2542, the Court first concluded that that interest "is related to expression in the case of Johnson's burning of the flag," *ibid.* (citing *Spence* v. *Washington*, 418 U.S. 405 (1974)). The Court noted that the State appeared to be concerned "that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts." 109 S. Ct. at 2542. Since those "concerns blossom only when a person's treatment of the flag communicates some message," the Court determined that the State's interest was related "to the suppression of free expression." *Ibid.* And the Court

specifically found that Johnson "was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." *Id.* at 2543. Consequently, the less stringent standard of *O'Brien* was inapplicable. Instead, the Court subjected the State's "asserted interest in preserving the special symbolic character of the flag to 'the most exacting scrutiny.'" *Ibid.* (quoting *Boos* v. *Barry*, 485 U.S. 312, 321 (1988)).[3]

The Court concluded that that interest could not overcome "a bedrock principle underlying the First Amendment," namely, "that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." 109 S. Ct. at 2544. The Court rejected the proposition that "a State may foster its own view of the flag by prohibiting expressive conduct related to it," *id.* at 2545, stating that it has "never before * * * held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents," *id.* at 2546. And the Court refused to accord the flag any special constitutional protection, finding that there is "no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone." *Ibid.*

Chief Justice Rehnquist, joined by Justices White and O'Connor, dissented. 109 S. Ct. at 2548-2555.

---

[3] The Court noted that the record contained no suggestion that the defendant had stolen the flag he burned. As a result, the Court made clear that "nothing in [its] opinion should be taken to suggest that one is free to steal a flag so long as one later uses it to communicate an idea." *Texas* v. *Johnson*, 109 S. Ct. at 2544 n.8.

He stated: "For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way * * * Johnson did here." *Id.* at 2548. The Chief Justice pointed out that the "flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas." *Id.* at 2552. Accordingly, he could not agree that "the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag." *Ibid.*[4]

Justice Stevens also dissented. 109 S. Ct. at 2555-2557. Given the "unique value" of the flag as a national symbol, Justice Stevens concluded that the government's interest in preserving that symbol certainly "supports a prohibition on the desecration of the American flag." *Id.* at 2557.

---

[4] Analogizing Johnson's flag burning to the "fighting words" denied First Amendment protection in decisions such as *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), the Chief Justice stated that "it may equally well be said that the public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace," 109 S. Ct. at 2553. And he emphasized that the Texas statute "deprived Johnson of only one rather inarticulate symbolic form of protest—a form of protest that was profoundly offensive to many—and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy." *Id.* at 2554. In other words, "in no way can it be said that Texas is punishing him because his hearers—or any other group of people—were profoundly opposed to the message that he sought to convey." *Ibid.*

B. The Flag Protection Act of 1989

1. The Court's decision in *Texas* v. *Johnson* immediately raised concerns in the Executive and Legislative Branches over the vitality of 18 U.S.C. 700 (a) (1988), the federal prohibition against desecration of the American flag. See note 1, *supra*. In *Johnson*'s wake, Congress moved with considerable dispatch to protect the physical integrity of the American flag. See, *e.g.*, 135 Cong. Rec. S7457 (daily ed. June 23, 1989) (statement of Sen. Biden). By mid-July 1989, a number of different proposals either to amend the federal statute or amend the Constitution had been introduced in both the Senate and the House of Representatives. See, *e.g.*, S. Rep. No. 152, 101st Cong., 1st Sess. 6 (1989); H.R. Rep. No. 231, 101st Cong., 1st Sess. 2-3 (1989).

During the summer of 1989, the Judiciary Committees of both the House and Senate held extensive hearings with respect to the appropriate means of preserving a prohibition against flag burning. See *Statutory and Constitutional Responses to the Supreme Court Decision in* Texas *v.* Johnson: *Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) [*House Hearings*]; *Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) [*Senate Hearings*]. Committee members heard widely divergent testimony from a variety of sources, including Members of Congress, concerned citizens, representatives of veterans' organizations, constitutional law scholars, prominent jurists and attorneys, and representatives from the

Department of Justice.[5] As a result of those hearings, each Committee reported out a bill to amend the current federal statute in light of *Texas* v. *Johnson*.

2. The Senate bill, S. 1338, 101st Cong., 1st Sess. (1989), would have amended 18 U.S.C. 700(a) by deleting the element of "casts contempt upon" the flag. Instead, the Senate proposal would have made criminally liable "[w]hoever knowingly mutilates, defaces, burns, maintains on the floor or ground, or tramples upon any flag of the United States." S. Rep. No. 152, *supra*, at 16. The Committee Report explained that the Senate bill's purpose

> is to protect the physical integrity of the American flag * * *. The subject matter of this legislation is unique, as the American flag has an historic and intangible value unlike any other symbol. * * *

S. Rep. No. 152, *supra*, at 2.

Furthermore, the report reflected the Committee's concerted effort to draft a bill consistent with the holding in *Texas* v. *Johnson*:

---

[5] William P. Barr, Assistant Attorney General, Office of Legal Counsel, presented testimony on behalf of the Department of Justice. He explained the Department's position at length before both the House and Senate Judiciary Committees "that, in light of the expansive decision of the Court [in *Texas* v. *Johnson*], a statute simply would not suffice, and that the only way to ensure protection of the Flag is through a constitutional amendment." *House Hearings* 173; *Senate Hearings* 71; see *House Hearings* 166-199; *Senate Hearings* 64-99, 115-117. Attorney General Thornburgh reiterated that position in a letter submitted to the Senate Judiciary Committee. See *id.* at 118-119.

> [U]nlike the law struck down in *Texas* v. *Johnson*—which was content-based—S. 1338 is content-neutral. Unlike the law struck down in *Texas* v. *Johnson*, whether one's treatment of the flag violates the amended Federal law would not depend on the likely communicative impact of the conduct. And unlike the law struck down in *Texas* v. *Johnson*, the amended Federal law is in fact "aimed at protecting the physical integrity of the flag in all circumstances."

S. Rep. No. 152, *supra*, at 10. The Committee recognized that its bill would likely face a constitutional challenge, but after weighing competing arguments, specifically concluded that the bill "would pass constitutional muster." S. Rep. No. 152, *supra*, at 15.

The House bill, H.R. 2978, 101st Cong., 1st Sess. (1989)—which, with minor changes, became the Flag Protection Act of 1989—expanded on the proposed Senate bill by including a different definition of "flag of the United States," an exception for disposing of a worn or soiled flag, and a provision for expedited judicial review. See H.R. Rep. No. 231, *supra*, at 1-2, 13-14; pp. 2-3, *supra*.[6] Like its counterpart in the Senate, the Committee Report explained that the bill's purpose "is to protect the physical integrity of American flags." H.R. Rep. No. 231, *supra*, at 2.[7] The Committee Report made clear that

---

[6] Unlike its Senate counterpart, the House bill originally limited proscribed acts to "mutilates, defaces, burns, or tramples." See H.R. Rep. No. 231, *supra*, at 13. The House later accepted the Senate amendments and expanded the list of proscribed acts to include "physically defile[]" and "maintain[] on the floor or ground." See note 9, *infra*.

[7] For that reason, the bill included an exception for disposal of a worn or soiled flag. As the Committee Report

the bill, like its counterpart in the Senate, was carefully considered and drafted in light of *Texas* v. *Johnson*:

> The bill responds to [that] decision * * * by amending the current Federal flag statute to make it content-neutral: that is, the amended statute focuses exclusively on the conduct of the actor, irrespective of any expressive message he or she might be intending to convey. The bill serves the national interest in protecting the physical integrity of all American flags in all circumstances. This interest is "unrelated to the suppression of free expression." *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968).

H.R. Rep. No. 231, *supra*, at 2.[8]

3. On September 12, 1989, after a floor debate, the House of Representatives overwhelmingly passed

---

explained, "[w]hen a flag, through normal usage and the passage of time, has become worn or soiled, so that it is no longer a fitting emblem for display, the governmental interest in protecting its physical integrity no longer applies." H.R. Rep. No. 231, *supra*, at 9. The bill also narrowed the definition of a "flag of the United States" to avoid "infirmities of vagueness or overbreadth." H.R. Rep. No. 231, *supra*, at 12.

[8] The Committee was aware that the bill would likely face constitutional challenges, and thus sought to minimize "the delay and uncertainty that might result from extended litigation to determine the constitutionality of the statute." H.R. Rep. No. 231, *supra*, at 10. Accordingly, the bill included an express provision for expedited review "[i]n order to achieve prompt Supreme Court review of the constitutionality of the revised federal flag protection law." H.R. Rep. No. 231, *supra*, at 10.

H.R. 2978, as reported out of committee, by a vote of 380 to 38. See 135 Cong. Rec. H5500-H5514, H5562 (daily ed. Sept. 12, 1989). As a result, the Senate proceeded to consider that bill, as opposed to S. 1338. See 135 Cong. Rec. S12,571 (daily ed. Oct. 4, 1989). And on October 5, the Senate, after adding two proscribed acts to the bill,[9] overwhelmingly passed H.R. 2978, by a vote of 91 to 9. See 135 Cong. Rec. S12,655 (daily ed. Oct. 5, 1989). The amended bill was therefore returned to the House, where, on October 12, it was passed by a wide margin (371-43). See 135 Cong. Rec. H6997 (daily ed. Oct. 12, 1989). The President allowed the bill to become law without his signature on October 28, 1989.[10]

---

[9] The Senate added to H.R. 2978, as passed by the House, the proscribed acts of "physically defile[]" and "maintain[] on the floor or ground." See 135 Cong. Rec. S12,616-S12,619 (daily ed. Oct. 4, 1989); *id.* at S12,654-S12,655 (daily ed. Oct. 5, 1989). The House ultimately accepted those changes. See note 6, *supra*.

[10] In his formal statement to Congress, the President expressly endorsed Congress's aim of achieving "our mutual goal of protecting our Nation's greatest symbol * * * from desecration." Statement on the Flag Protection Act of 1989, 25 Weekly Comp. Pres. Doc. 1619 (Oct. 26, 1989). At the same time, he stated his "serious doubts that [the legislation] can withstand Supreme Court review," and made clear his position "that a constitutional amendment is the only way to ensure that our flag is protected from desecration." *Ibid.*

Nevertheless, as the Court noted in *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981), "[t]he Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States. * * * The cus-

C. Criminal Charges

1. *United States* v. *Eichman*

a. On October 30, 1989, appellees, Shawn D. Eichman, David Gerald Blalock, and Scott W. Tyler, participated in a demonstration outside the Capitol, in Washington, D.C.[11] That demonstration, occurring shortly after the Flag Protection Act of 1989 became effective, was hailed as a "CHALLENG[E]" to that statute. J.A. 55. As stated in a leaflet distributed at the rally:

> The battle lines are drawn. On one side stands the government and all those in favor of compulsory patriotism and enforced rever[e]nce to the flag. On the other side are all those[] opposed to this. And to all the oppressed we have this to say also. This flag means one thing to the powers that be and something else to all of us. Everything bad this system has done and continues to do to people all over the world has

tomary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." Cf. *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971) (per curiam); *id.* at 727-730 (Stewart, J., concurring); *id.* at 730-740 (White, J., concurring). Under such circumstances, the Executive Branch enforced the statute and fulfilled its obligation to "take care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. And it is our position in this Court that the Court should uphold the constitutionality of the Flag Protection Act because of Congress's determination regarding the weight of the governmental interest at stake and because the proscribed conduct, even when undertaken for communicative purposes, should not fall within the protection of the First Amendment.

[11] Since the district court granted appellees' pretrial motion to dismiss the flag-burning charges, the pertinent facts are not disputed. See 89-1433 J.S. App. 2a.

> been done under this flag. No law, no amendment will change it, cover it up, or stiffle [*sic*] that truth. So to you we say, Express yourself! Burn this flag. It's quick, it's easy, it may not be the law, but it's the right thing to do.

J.A. 56; see 89-1433 J.S. App. 2a & n.1. During that demonstration, appellees each set an American flag on fire; those flags were incinerated. 89-1433 J.S. App. 2a-3a; see Declaration of Edward L. Bailor (Jan. 1, 1990), Attachment A at 1, to U.S. Mem. in Opp. to Defendants' Mot. to Dismiss, *United States* v. *Eichman*, Cr. No. 89-419 (D.D.C. filed Jan. 12, 1990).

b. On October 31, 1989, the United States Attorney for the District of Columbia filed separate criminal informations charging each appellee with one count of knowingly burning a flag of the United States, in violation of 18 U.S.C. 700(a) (as amended). J.A. 31-33.[12]

On December 5, 1989, appellees filed a joint motion to dismiss the criminal informations. Appellees contended that the Flag Protection Act of 1989, both on its face and as applied to their particular conduct, could not withstand the stringent standard of

[12] Gregory Johnson, whose state criminal conviction culminated in *Texas* v. *Johnson*, had also participated in the demonstration at the Capitol. Johnson tried to burn an American flag, but that attempt was foiled when a police officer grabbed the flag out of Johnson's hands before he could set it ablaze. As a result, the United States Attorney declined to charge Johnson with violating the Flag Protection Act. See 89-1433 J.S. App. 2a-3a & n.4; U.S. Mem. in Opp. to Defendants' Mot. to Dismiss at 2 n.3, *United States* v. *Eichman*, Cr. No. 89-419 (D.D.C. filed Jan. 12, 1990).

review mandated by *Texas* v. *Johnson*, and therefore violated the First Amendment.[13]

2. *United States* v. *Haggerty*

a. On October 28, 1989, appellees, Mark John Haggerty, Carlos Garza, Jennifer Proctor Campbell, and Darius Allen Strong, participated in a rally outside a post office in Seattle, Washington.[14] That rally, scheduled to begin precisely when the Flag Protection Act of 1989 became effective, was advertised as a "Festival of Defiance." 89-1434 J.S. App. 5a n.3. As stated in a leaflet publicizing the event:

> On October 28th it becomes illegal to desecrate the flag. This fascist law is not an "exception" to the concept of free speech but an attack on political protest and dissent, and a precedent for the future. Blind patriotism must not be the law of the land. Unlike the flag-kissers, we will not whine, we will Rock & Roll in a Festival of Defiance.

J.A. 79; see 89-1434 J.S. App. 5a-6a n.3. During that rally, an American flag belonging to the United States Postal Service was taken down from the flagpole outside the post office. Appellees then set that flag on fire and raised it back up the flagpole, where

[13] The United States Senate, through the Senate Legal Counsel, and the Speaker of the House of Representatives (representing the Democratic Leadership), through the General Counsel to the Clerk of the House, each filed a brief amicus curiae in opposition to appellees' motion.

[14] As in *Eichman*, since the district court granted appellees' pretrial motion to dismiss the flag-burning charge, the pertinent facts are not disputed. See 89-1434 J.S. App. 2a.

it became almost completely charred. 89-1434 J.S. App. 2a; see J.A. 36-40.[15]

b. On November 28, 1989, the United States Attorney for the Western District of Washington filed a criminal information charging appellees with one count of willfully injuring property of the United States, in violation of 18 U.S.C. 1361 and 2, and one count of knowingly burning a flag of the United States, in violation of 18 U.S.C. 700(a), as amended by the Flag Protection Act of 1989. J.A. 34-35.

On January 18, 1990, appellees filed a joint motion to dismiss the flag-burning charge.[16] Appellees contended that the Flag Protection Act of 1989, both on its face and as applied to their particular conduct, could not withstand the stringent standard of review mandated by *Texas* v. *Johnson*, and therefore violated the First Amendment.[17]

D. The District Court Decisions

In separate decisions issued in February and March 1990,[18] the district courts in *Eichman* and

[15] A composite videotape of the rally, which is part of the record, see J.A. 36-37 (¶ 6), shows that acts of violence occurred during the course of these events.

[16] Appellees also filed a motion to dismiss the entire information because of prosecutorial misconduct. 89-1434 J.S. App. 2a n.1. The district court denied that motion on February 28, 1990, after the notice of appeal had been filed. See J.A. 30.

[17] As in *Eichman*, the United States Senate, through the Senate Legal Counsel, and the Speaker of the House of Representatives (representing the Democratic Leadership), through the General Counsel to the Clerk of the House, each filed a brief amicus curiae in opposition to appellees' motion.

[18] The district courts in both *Eichman* and *Haggerty* engaged in a substantially similar analysis in striking down the

Haggerty granted appellees' motions to dismiss the flag-burning charges, holding that the Flag Protection Act of 1989, as applied to appellees' conduct, violated the First Amendment. 89-1433 J.S. App. 1a-18a; 89-1434 J.S. App. 1a-16a.[19] As a threshold matter, the court in *Eichman* concluded that appellees' "flag-burning constitutes expressive conduct of an overtly political nature, and thus implicates the First Amendment." 89-1433 J.S. App. 10a; accord 89-1434 J.S. App. 5a.

Turning to the applicable standard of review, the district court in *Eichman* determined that, under *Texas* v. *Johnson*, courts must apply strict scrutiny. Here, like the State's purpose in outlawing flag desecration in *Texas* v. *Johnson*, the "underlying purpose [of the the Flag Protection Act] is to preserve the flag's symbolic value." 89-1433 J.S. App. 10a. The court therefore concluded that the Act "relates to the suppression of expression and should be

---

Flag Protection Act as applied to appellees' flag burning. For that reason, we refer the Court to the *Eichman* decision and provide citations to the corresponding portions of the *Haggerty* decision.

[19] For that reason, the district courts did not address appellees' claims that the statute was unconstitutional on its face. 89-1433 J.S. App. 15a n.9; 89-1434 J.S. App. 2a, 15a.

On March 20, 1990, after the notice of appeal had been filed, the district court in *Haggerty* purported to issue an amended memorandum decision. Apart from minor editorial or stylistic changes, the district court added the following concluding footnote: "Given this result, the court need not address [appellees'] other argument that the Flag Protection Act is unconstitutional on its face." Amended Mem. Dec. at 17 n.8, *United States* v. *Haggerty*, No. CR 89-315-R (W.D. Wash. Mar. 20, 1990).

scrutinized rigorously." 89-1433 J.S. App. 11a; accord 89-1434 J.S. App. 10a.[20]

The Senate, as amicus curiae, contended that the governmental interest underlying the Flag Protection Act was not related to the suppression of expression, because Congress was seeking "to protect the physical integrity of the flag to preserve it as a universal symbol, embodying a diversity of views." 89-1433 J.S. App. 12a; accord 89-1434 J.S. App. 10a. The district court in *Eichman* rejected that argument, explaining that

> [i]t makes no difference whether we describe [the flag] as a political symbol, or a symbol of the nation and nationhood, or the symbol under which a pluralistic society can strive to find common ground. For in protecting the flag for those who wish to waive [sic] it in support of these causes, but preventing the defendants from burning it in opposition, the government has created a regulation which cannot be justified without reference to the content of the defendants' message.

89-1433 J.S. App. 14a; accord 89-1434 J.S. App. 10a-11a. In the court's view, the statute's "restriction, as applied to [appellees], is content-based and is subject to strict scrutiny." 89-1433 J.S. App. 14a; accord 89-1434 J.S. App. 11a.[21]

---

[20] The United States agreed with appellees that, under *Texas* v. *Johnson*, the Flag Protection Act was subject to strict scrutiny, as opposed to the more lenient *O'Brien* standard of review. 89-1433 J.S. App. 11a; 89-1434 J.S. App. 8a.

[21] In *Haggerty*, the district court rejected as constitutionally irrelevant the fact that the Flag Protection Act "leaves open ample alternative channels for communication in that it does not prohibit protest against governmental

The House of Representatives, as amicus curiae, took a different approach, contending that the governmental interest underlying the Flag Protection Act was not related to the suppression of expression, because Congress sought "to protect the state's sovereign interest in the flag." 89-1433 J.S. App. 14a; accord 89-1434 J.S. App. 12a. The district court in *Eichman* dismissed that argument on two grounds: first, "the legislative history of the Act does not contain a single reference to the Congress' alleged sovereignty interest," 89-1433 J.S. App. 15a; accord 89-1434 J.S. App. 12a, and second, "[t]he government's only possible interest in protecting the physical integrity of the flag as an incident of sovereignty is to prevent or punish acts of disrespect amounting to a rejection of United States sovereignty," 89-1433 J.S. App. 15a; accord 89-1434 J.S. App. 12a-13a.

Applying strict scrutiny, the district court in *Eichman* concluded that "the government's interest in protecting the physical integrity of the flag to preserve its symbolic value is [not] sufficiently compelling to justify convicting [appellees] for burning United States flags." 89-1433 J.S. App. 15a; accord 89-1434 J.S. App. 14a. The court observed that in *Texas* v. *Johnson*, this Court stated that "the government may not foster its own view of the flag by prohibiting expressive conduct relating to it," 89-1433 J.S. App. 16a (quoting *Texas* v. *Johnson*, 109 S. Ct. at 2545); accord 89-1434 J.S. App. 14a. And

---

policies in other ways." 89-1434 J.S. App. 11a n.6 (citing *Spence* v. *Washington*, 418 U.S. 405, 411 n.4 (1974)).

In *Haggerty*, the district court also declined to uphold the Flag Protection Act on the ground that the statute "was not aimed at protecting the physical integrity of the flag in all circumstances," since the Act failed to do so. 89-1434 J.S. App. 11a n.6.

the court decided that *Texas* v. *Johnson* foreclosed the government's claim that Congress, on behalf of the Nation, has a "sufficiently compelling [interest in preserving the flag as a national symbol] to survive strict scrutiny." 89-1433 J.S. App. 16a; accord 89-1434 J.S. App. 14a.[22]

SUMMARY OF ARGUMENT

I. In *Texas* v. *Johnson*, 109 S. Ct. 2533 (1989), the Court held that a Texas statute outlawing desecration of venerated objects, as applied to the burning of an American flag, violated the First Amendment. By contrast, these cases involve the Flag Protection Act of 1989, a federal statute enacted in response to *Texas* v. *Johnson*, under circumstances in which Congress was mindful of the First Amendment's express strictures. The Court has long acknowledged "[t]he customary deference accorded judgments of Congress," particularly where, as here, "Congress specifically considered the question of the Act's constitutionality." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981). In light of that established principle—and Congress's determination of the harm inflicted by burning of the flag—the courts below misconstrued *Texas* v. *Johnson* as essentially foreclosing the constitutionality of the Flag Protection Act.

The pertinent constitutional analysis should focus on the sort of expressive conduct at issue here—

---

[22] In *Haggerty*, the district court, once notified of the government's intention to take an interlocutory appeal to this Court, rescinded its order scheduling trial for February 26 on the remaining count of willfully injuring property of the United States, pending final disposition of the appeal. Order, *United States* v. *Haggerty*, No. CR 89-315-R (W.D. Wash. Feb. 21, 1990).

flag burning (and other physical assaults on the flag) and then take into account the national consensus underlying the statute—that physical destruction of the American flag, the unique symbol of the Nation, constitutes a violent assault on the shared values that bind our national community. When viewed from the proper constitutional perspective, the Flag Protection Act fully comports with the First Amendment.

II. The United States does not dispute that appellees' flag burning constitutes expressive conduct. Nor does the United States dispute that Congress enacted the Flag Protection Act in order to protect the physical integrity of the flag under all circumstances and thus necessarily to encompass within its prohibition that narrow category of "symbolic speech"—expressive conduct that involves mishandling the American flag to convey a message. But this does not doom Congress's considered judgment in passing this measure. The First Amendment does not prohibit Congress, as it provided in the Flag Protection Act, from removing the American flag as a prop available to those who seek to express their own views by destroying it.

This Court has never assumed that all speech, including expressive conduct, is entitled to full First Amendment protection; to the contrary, the Court over the years has identified a variety of categories of expression as beyond the pale of "the freedom of speech." Such categories of expression, the Court has observed, "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 582 (1942). The Court's decisions show

that the protections of the First Amendment do not apply where (1) the speech (or expressive conduct) is narrowly and precisely defined, (2) whatever value the expression may have to the speaker (or others) is outweighed by its demonstrable destructive effect on society as a whole or on particular overarching social policies, and (3) the speaker has suitable alternative means to express (and others have means to receive) whatever protected expression may be part of the intended message.

These constraining principles of First Amendment analysis apply to appellees' burning of a flag of the United States. Congress and the President—the Nation's elected representatives—have now spoken with one voice: the physical integrity of the flag of the United States, as the unique symbol of the Nation, merits protection not accorded other national emblems. The reason is this: Flag burning is, by its nature, a physical, violent assault on the most deeply shared experiences of the American people, including the sacrifices of our fellow citizens in defense of the Nation and the preservation of liberty. It is the physical assault and accompanying violation of the flag's physical integrity—not robust and uninhibited debate—that occasion the injury that our society should not be called upon to bear.

For these reasons, the Court should treat the conduct at issue—physical destruction of a flag of the United States—as it has other narrowly defined categories of expressive conduct that have not merited full protection under the First Amendment. Flag burning, like obscene materials, defamatory statements and a variety of other "speech" or expressive conduct, presents substantial "evils" incompatible with "the very purpose for which organized gov-

ernments are instituted," *Texas* v. *Johnson*, 109 S. Ct. at 2555 (Rehnquist, C.J., dissenting). In view of the inherently destructive nature of flag burning, the system of free expression ordained by the First Amendment is not compromised by a highly specific, narrowly tailored prohibition on physical attacks upon the flag.

These cases therefore call for the Court to reconsider the assumption in *Texas* v. *Johnson* that flag burning is a form of expressive conduct meriting full First Amendment protection. Reconsideration of that premise is particularly appropriate where, as here, the people's elected representatives have made the considered decision that (save for a specific and well-recognized exception) the physical destruction of the flag is—uniquely—anathema to the Nation's values.

Although the act of burning an American flag falls outside the scope of protected speech under the First Amendment, a governmental prohibition on such conduct must still withstand judicial scrutiny since the proscribed conduct will, as here, likely be accompanied by otherwise fully protected expression. The Flag Protection Act, drafted by Congress to preclude a circumscribed type of conduct, fully ensures that only unprotected expression will be prosecuted. There is, thus, no danger that any individual would be prosecuted under the statute for what the person says about the flag. Cf. *Street* v. *New York*, 394 U.S. 576 (1969).

III. Our submission is, we recognize, in tension with certain doctrinal underpinnings of the Court's recent decision in *Texas* v. *Johnson*. The Court there, of course, had no occasion to address, much less weigh for constitutional purposes, the sort of *Congressional* determination regarding the need to protect the

American flag that led to enactment of the Flag Protection Act. Moreover, the Court was faced with a statute, unlike the federal measure (as now amended), that prohibited acts that "the actor knows will seriously offend one or more persons * * *." Texas Penal Code § 42.09(b) (1974). To the extent that *Johnson* accorded flag burning, as expressive conduct, full First Amendment protection—as the courts below construed that decision and as appellees urge before this Court—*Texas* v. *Johnson* should be reconsidered and, upon reconsideration, appropriately limited.

ARGUMENT

THE FIRST AMENDMENT DOES NOT PROHIBIT THE UNITED STATES FROM PROSECUTING APPELLEES FOR KNOWINGLY BURNING FLAGS OF THE UNITED STATES IN VIOLATION OF THE FLAG PROTECTION ACT OF 1989

I. *TEXAS* v. *JOHNSON* DOES NOT FORECLOSE THE VALIDITY OF THE FLAG PROTECTION ACT OF 1989 IN LIGHT OF CONGRESS'S CONSIDERED LEGISLATIVE JUDGMENT THAT THERE IS A COMPELLING NATIONAL INTEREST IN PROTECTING THE FLAG

In *Texas* v. *Johnson*, 109 S. Ct. 2533 (1989), a sharply divided Court held that a Texas statute outlawing desecration of venerated objects, as applied to the burning of an American flag, violated the First Amendment. In so holding, the Court stressed one infirmity of that state law provision—the law "reache[d] only those severe acts of physical abuse of the flag carried out in a way likely to be offensive." *Id.* at 2543. In addition, the *Johnson* Court emphasized the narrowness of the question it was deciding. See *id.* at 2544 n.8 ("Our inquiry is, of course, bounded by the particular facts of this case

and the statute under which Johnson was convicted.").

By contrast, these cases involve the Flag Protection Act of 1989, a federal statute enacted in response to *Texas* v. *Johnson*, under circumstances in which Congress was mindful of the First Amendment's stricture that "Congress shall make no law * * * abridging the freedom of speech * * *." U.S. Const. Amend I. Congress drafted the statute within this constitutional framework, making a considered legislative determination that the American flag is a unique national symbol deserving special protection consistent with applicable First Amendment limitations.

The Court has long acknowledged that "[w]henever called upon to judge the constitutionality of an Act of Congress—'the gravest and most delicate duty that this Court is called upon to perform,' *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)—the Court affords 'great weight to the decisions of Congress.'" *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973)). That established principle applies even though legislation may implicate fundamental constitutional rights guaranteed by the First Amendment. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, *supra*; see *Fullilove* v. *Klutznick*, 448 U.S. 448, 472 (1980) (opinion of Burger, C.J.). To be sure, as this Court has stated, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 843 (1978). Nevertheless, "[t]he customary deference accorded the judgments of Congress is certainly appropriate when * * * Congress specifically considered the question of the Act's constitutionality." *Rostker* v. *Goldberg*, 453 U.S. at 64; see *United States* v. *Watson*, 423 U.S. 411, 421-423 (1976).

In light of these established principles, the courts below misconstrued *Texas* v. *Johnson* as essentially foreclosing the constitutionality of the Flag Protection Act. See 89-1433 J.S. App. 15a-16a; 89-1434 J.S. App. 14a-15a. Instead, as we set forth below, the pertinent constitutional analysis should focus on the sort of expressive conduct at issue here—flag burning—and then take into account the national consensus underlying the Flag Protection Act—that physical destruction of the American flag, the unique symbol of the Nation, constitutes a violent assault on the shared values that bind our national community. Absent from the backdrop of *Texas* v. *Johnson* was the testament to the depth of the national interest in protecting the flag that is embodied in the Flag Protection Act, and the considered judgment of Congress—as opposed to that of a single state legislature—that it was critically important to vindicate that interest in the wake of this Court's decision with respect to the Texas statute. When viewed from the proper constitutional perspective, the Flag Protection Act fully comports with the First Amendment.[23]

---

[23] Congress attempted to respond to the constitutional shortcomings noted by the Court in striking down the Texas statute. In particular, Congress regarded the Flag Protection Act as content-neutral, reasoning that the statute protects the flag from physical damage regardless of the content of the message the actor wishes to convey by destroying it. See 89-1433 J.S. App. 13a; 89-1434 J.S. App. 9a; pp. 9-13, *supra*. Cf. *Texas* v. *Johnson*, 109 S. Ct. at 2543 (strict scrutiny applied since "Johnson's political expression was restricted because of the content of the message he conveyed"). As the district courts noted, however, protecting the flag from

II. SINCE PHYSICAL DESTRUCTION OF A FLAG OF THE UNITED STATES FALLS OUTSIDE THE SCOPE OF PROTECTED EXPRESSIVE CONDUCT UNDER THE FIRST AMENDMENT, THE FLAG PROTECTION ACT'S NARROW PROHIBITION SATISFIES APPLICABLE CONSTITUTIONAL STANDARDS

The United States does not dispute that appellees' flag burning constitutes expressive conduct. See, *e.g.*, *Texas* v. *Johnson*, 109 S. Ct. at 2539-2540; *Spence* v. *Washington*, 418 U.S. 405, 409-410 (1974). Indeed, the record makes plain that appellees' actions were part of organized political demonstrations—protests aimed at any number of current social and political issues. See 89-1433 J.S. App. 2a-3a; 89-1434 J.S. App. 2a, 5a & n.3; J.A. 46-67, 74-84. Nor does the United States dispute that Congress enacted the Flag Protection Act in order to protect the physical integrity of the flag under all circumstances and thus necessarily to encompass within its prohibition that narrow category of "symbolic speech"—expressive conduct that involves destruction (or mishandling) of the American flag to convey any given message. Indeed, that is precisely the purpose of this

---

anyone who "mutilates, defaces, physically defiles, burns, maintains [it] on the floor or ground, or tramples upon [it]," 18 U.S.C. 700(a)(1) (as amended), is implicitly (if not explicitly) based on a view that the flag stands for something valuable, and should be safeguarded because of that value. The significance, in terms of First Amendment doctrine, of Congress's action lies in its articulation of the compelling governmental interest in protecting the flag and the extension of that protection to all acts of destruction of the flag's physical integrity, a scope of protection which necessarily encompasses acts of expressive conduct, such as appellees' flag burning.

criminal provision. As the Senate Judiciary Committee explained:

> The flag has stood as the unique and unalloyed symbol of the Nation for more than 200 years. In seeking to protect its physical integrity, Congress is simply ratifying the unique status conferred upon the flag by virtue of its historic function as the emblem of this Nation.

S. Rep. No. 152, *supra*, at 3; see H.R. Rep. No. 231, *supra*, at 9.

But this does not doom Congress's considered judgment in passing this measure. As this Court has acknowledged, "to say the [Act] presents a First Amendment *issue* is not necessarily to say that it constitutes a First Amendment *violation*." *City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 803-804 (1984). That is so because the Court has long recognized, in a wide variety of contexts, "that the unconditional phrasing of the First Amendment was not intended to protect every utterance." *Roth* v. *United States*, 354 U.S. 476, 483 (1957). And the Court has made clear that the "Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Texas* v. *Johnson*, 109 S. Ct. at 2540; cf. *United States* v. *O'Brien*, 391 U.S. 367, 376-377 (1968).

In these cases, the courts below overvalued, for purposes of the First Amendment, the narrow category of expressive conduct at stake, and undervalued the compelling governmental interest—expressly identified by both the Congress and the President—that lies at the core of the statute: the preservation of the flag as the unique symbol of our Nation.[24] In

---

[24] In *Haggerty*, appellees are charged with burning a flag of the United States that belonged to the United States Postal

our view, the First Amendment does not prohibit Congress from removing the American flag as a prop available to those who would express their own views by destroying it.

In a long line of established precedent, the Court has "laid the foundation for the excision of [certain speech] from the realm of constitutionally protected expression." *New York* v. *Ferber*, 458 U.S. 747, 754 (1982). It is not, nor has it ever been, the law that all expression—much less all expressive conduct—is protected by the broad sweep of the First Amendment. The Court has often set its face against vari-

---

Service. 89-1434 J.S. App. 2a. In *Texas* v. *Johnson*, the Court expressly left open the question whether an individual may be prosecuted for burning a flag after he had stolen it. 109 S. Ct. at 2544 n.8; see *id.* at 2557 (Stevens, J., dissenting); see also note 3, *supra*. In our view, the Flag Protection Act, as applied to appellees' *particular* conduct, *i.e.*, burning an American flag that is property of the United States, is plainly constitutional. Indeed, in *Spence* v. *Washington*, 418 U.S. 405, 409 (1974), the Court stated that "[w]e have no doubt that the State or National Governments constitutionally may forbid anyone from mishandling in any manner a flag that is public property."

Nevertheless, the statute, as drafted by Congress, is not readily "subject to such a limiting construction," *New York* v. *Ferber*, 458 U.S. 747, 769 n.24 (1982), and we do not urge the Court to resolve *Haggerty* on that ground. As the district court in *Haggerty* apparently concluded, the statute is still susceptible to a substantial overbreadth challenge under the First Amendment, and thus this Court must consider the statute's application to the destruction of flags that do not happen to be federal property—the circumstances presented in the consolidated appeal in *Eichman*. See *New York* v. *Ferber*, 458 U.S. at 766-773; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611-615 (1973); cf. *Massachusetts* v. *Oakes*, 109 S. Ct. 2633, 2637 (1989) (plurality opinion); *id.* at 2640-2641 (Scalia, J., concurring in the judgment in part and dissenting in part); *id.* at 2642 (Brennan, J., dissenting).

ous forms of expression that have marginal utility in our system of free expression and which occasion (or threaten) cognizable harm. In so doing, the Court has carefully evaluated the nature of the First Amendment interests at stake and excepted from the ambit of constitutional protection a variety of categories of speech and expressive conduct.

The First Amendment, in other words, is not value free. To the contrary, the libertarian model of First Amendment analysis, although demonstrably the prevalent theme in the Court's modern jurisprudence, has not swept all competing themes off the constitutional board. The marketplace of ideas, like other markets, has limits.

A. This Court has identified a variety of categories of expression as being beyond the pale of First Amendment protection.[25] See, *e.g.*, *New York* v. *Ferber*, *supra* (child pornography); *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) (speech promoting illegal activity); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) (defamation); *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (speech promoting illegal activity); *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969) (speech likely to incite violence); *Roth* v. *United States*, 354 U.S. 476 (1957) (obscenity); *Chaplinsky* v. *New Hampshire*,

---

[25] As summarized by the Court over a generation ago:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting words"—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Chaplinsky v. *New Hampshire*, 315 U.S. 568, 571-572 (1942).

315 U.S. 568 (1942) (fighting words). Such categories of expression, the Court has observed, "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire*, 315 U.S. at 572. In other words,

> it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of a given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.

New York v. *Ferber*, 458 U.S. at 763-764; see *Whitney* v. *California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring). As both the express language of *Ferber* and the range of cases cited above show, considering whether the expressive activity at issue is outside the "freedom of speech" protected by the First Amendment—on the basis of its content—is hardly an "unprecedented theory." Appellees' Mem. at 10.

To be sure, the Court has consistently recognized "the inherent dangers of undertaking to regulate any form of expression." *Miller* v. *California*, 413 U.S. 15, 23 (1973). But acknowledging "the shared values of a civilized social order," *Bethel School Dist. No. 403* v. *Fraser*, 478 U.S. 675, 683 (1986), the Court has refused to accord certain narrow, well-defined types of speech full First Amendment protection.[26] As decisions such as *Ferber* suggest, the

[26] The Court has upheld restrictions on speech, despite the apparent reach of the First Amendment, on any number of occasions. See, *e.g.*, *Austin* v. *Michigan State Chamber of Commerce*, No. 88-1569 (Mar. 27, 1990) (corporate expenditures in support of political candidates); *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (speech in nonpublic forum); *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539 (1985) (speech subject to copyright); *Connick* v. *Myers*, 461 U.S. 138 (1983) (speech of public employees); *Snepp* v. *United States*, 444 U.S. 507 (1980) (per curiam) (speech disclosing confidential information); *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) (indecent speech on public airwaves).

protections of the First Amendment do not apply where (1) the speech (or expressive conduct) is narrowly and precisely defined, (2) whatever value the expression may have to the speaker (or others) is outweighed by its demonstrable destructive effect on society as a whole or on particular overarching social policies, see, *e.g.*, *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980) (false and misleading commercial speech); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969) (employer's anti-union statements before representation election), and (3) the speaker has suitable alternative means to express (and others have means to receive) whatever protected expression may be part of the intended message, cf. *Austin* v. *Michigan State Chamber of Commerce*, No. 88-1569 (Mar. 27, 1990), slip op. 7 (restrictions on corporate funds for political speech); *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (restrictions on exhibition of "adult films").[27]

[27] In both *Texas* v. *Johnson*, 109 S. Ct. at 2546 n.11, and *Spence* v. *Washington*, 418 U.S. at 411 n.4, the Court declined consideration of alternative means of expression, in the context of holding that the First Amendment protected symbolic speech involving the American flag. But the Court has by no means reflexively eschewed an alternative means analysis,

B. That constraining principle of the First Amendment applies to the conduct at issue—appellees' burning of a flag of the United States. Congress, which by design takes into account the interests of all citizens, see The Federalist No. 10, at 77 (J. Madison) (C. Rossiter ed. 1961), and the President, who is "elected by all the people," *Myers* v. *United States*, 272 U.S. 52, 123 (1926), have now spoken with one voice—the flag of the United States, as the unique symbol of the Nation, merits protection not accorded other national emblems.

As the Senate Judiciary Committee explained:

> The flag has stood as the unique and unalloyed symbol of the Nation for more than 200 years.

---

nor should it do so here. To the contrary, just the other day, that very approach figured prominently in the Court's analysis in a case involving restrictions on core political speech. In *Austin* v. *Michigan State Chamber of Commerce*, No. 88-1569 (Mar. 27, 1990), the Court upheld a restriction on use of general corporate funds for political speech, noting that "the Act does not impose an *absolute* ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds." Slip op. 7. (emphasis in original). If alternatives suffice when it comes to a non-profit corporation's desire to speak in favor of a political candidate, it is not clear to us why they should not suffice when it comes to appellees' desire to destroy the flag to convey a particular message.

Moreover, *Texas* v. *Johnson* assumed that flag burning merited full First Amendment protection. That assumption was not compelled by prior precedent, since the Court had previously never held that the First Amendment applied with full force to the physical destruction of the flag itself, as opposed to otherwise protected speech incident to such conduct. See *Spence* v. *Washington*, 418 U.S. at 414-415; *Smith* v. *Goguen*, 415 U.S. 566, 582 & n.32 (1974); *Street* v. *New York*, 394 U.S. 576, 594 (1969).

> In seeking to protect its physical integrity, Congress is simply ratifying the unique status conferred upon the flag by virtue of its historic function as the emblem of this Nation.

S. Rep. No. 152, *supra*, at 3. The House Judiciary Committee echoed those findings:

> [The prohibition against flag burning] recognizes the diverse and deeply held feelings of the vast majority of citizens for the flag, and reflects the government's power to honor those sentiments through the protection of a venerated object.

H.R. Rep. No. 231, *supra*, at 9. And the President expressly endorsed Congress's aim of achieving "our mutual goal of protecting our Nation's greatest symbol * * * from desecration." Statement on the Flag Protection Act of 1989, 25 Weekly Comp. Pres. Doc. at 1619.

In *Spence* v. *Washington*, 418 U.S. at 413, the Court eloquently foreshadowed the motivating force behind the Flag Protection Act:

> For the great majority of us, the flag is a symbol of patriotism, of pride in the history of our country, and of the service, sacrifice, and valor of the millions of Americans who in peace and war have joined together to build and to defend a Nation in which self-government and personal liberty endure. It evidences both the unity and diversity which are America.

And that representative consensus identifies the substantial potential harm posed by wanton physical destruction of the American flag.[28]

---

[28] Indeed, Congress originally enacted the predecessor statute in 1968 based on its finding that "[p]ublic burning, de-

Flag burning, in our view, represents more than a weakening or erosion of community values. Cf. *Miller* v. *California*, 413 U.S. at 19 (obscenity "carries with it a significant danger of offending the sensibilities of unwilling recipients"). As *Spence*'s description suggests, flag burning (or other forms of destruction or mutilation) is a physical, violent assault on the most deeply shared experiences of the American people, including the sacrifices of our fellow citizens in defense of the Nation and the preservation of liberty. As a powerful indication of its uniqueness, eloquently articulated by the political branches and this Court, the flag is inextricably tied in the national consciousness—especially in this Century—to the loss of American lives in service to their country and the cause of freedom. The flag stands as the most profound reminder that a physical assault on the Nation's unique symbol of community amounts, in the minds of the members of the community (and their elected representatives), to an assault on the memory of those who have sacrificed for the national community. It is a violent, destructive assault of far greater moment and injury to the national community than that occasioned by a mere verbal assault on a public official, such as saying to the Town Marshal of Rochester, New Hampshire, that the official is a "racketeer" or "Fascist." See *Chaplinsky* v. *New Hampshire*, 315 U.S. at 569. It is the physical assault—the physical

---

struction, and dishonor of the national emblem inflict[] an injury on the entire Nation." S. Rep. No. 1287, 90th Cong., 1st Sess. [*sic*; 2d] 3 (1968). It is thus not surprising that the Court in *Spence* described in detail Spence's conduct in taking no action that would injure or destroy the flag which he displayed in his apartment window. See *Spence* v. *Washington*, 418 U.S. at 406-409, 414-415.

attack—and the accompanying violation of the flag's physical integrity that occasion the injury that society should not be called upon to bear.

To be sure—indeed to be emphatic—the flag is not above criticism, including the most robust and uninhibited criticism, just as the Town Marshal victimized by Mr. Chaplinsky's verbal assault was not above criticism. But there is a line.[29] A line—difficult to draw but discernible by virtue of common human experience—unmistakably exists between expressions of political opinion (entitled to the most stringent First Amendment safeguards in the marketplace of ideas) and a verbal assault on an official's basic human dignity.[30]

Appellees here chose not only to speak, to confront, to lecture, and to challenge orthodox ideas, as was

---

[29] Basic humanity in our corporate life together requires a certain level of decency and civility in discourse. It requires basic human respect. That is what *Chaplinsky* and the defamation cases are, at bottom, all about. In the view of the United States, a destructive, physical assault on the flag itself goes beyond that level of decency, civility, and respect in discourse which merits constitutional protection. Civility in the exercise of expressive conduct has been specifically noted in this Court's decisions. See, *e.g.*, *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503, 507-514 (1969); *Brown* v. *Louisiana*, 383 U.S. 131, 133-140 (1966) (opinion of Fortas, J.); *id.* at 150-151 (opinion of White, J.).

[30] If concern for the moral sensibility of the community warrants exclusion of obscene materials from First Amendment protection, as it does, and if concerns for human dignity occasioned by injury to an individual's reputation warrant leaving in place (save for well-recognized exceptions) the law of defamation, as they do, then concern for the shared moral values of the community should allow for the one—indeed the unique—symbol of the community's corporate existence to stand above the fray of physical assault and destruction.

their bedrock constitutional right, they also chose to destroy and physically to tear apart. They were, we acknowledge, expressing an "idea" through their acts of destruction, just as Mr. Chaplinsky expressed an "idea"—indeed, a core political idea—in upbraiding the hapless Town Marshal and the Marshal's colleagues in the Rochester town government. But a pure libertarian vision of our system of free expression has never commanded this Court's decisions; the Court should not now create an anomaly in its First Amendment jurisprudence by transforming such "immature antic[s]," *Smith* v. *Goguen*, 415 U.S. 566, 590 (1974) (Blackmun, J., dissenting), into protected "speech" and thereby strike down an Act of Congress enacted with the deepest respect and assiduous concern for this Court's teachings.

For these reasons, the Court should treat the conduct at issue—physical destruction of a flag of the United States—as it has such other narrowly defined categories of expressive conduct that have not merited full protection under the First Amendment. Flag burning, like obscene materials, speech proposing an illegal activity, perjury, and defamatory statements,[31] presents substantial "evils" incompatible with "the very purpose for which organized governments are instituted," *Texas* v. *Johnson*, 109 S. Ct. at 2555 (Rehnquist, C.J., dissenting). And, such conduct (at most) involves "expressive interests" which, given the availability of other means of expression, are "overwhelmingly outweigh[ed]" by the identified harm. *New York* v. *Ferber*, 458 U.S. at 763,

[31] Such statements, of course, fit more literally than flag burning within the text of the First Amendment, yet they have been deemed unworthy of protection and thus not to constitute a component of "the freedom of speech" protected by the First Amendment.

764. Considered within this analytical framework, the Flag Protection Act is fully consistent with the First Amendment.[32]

This is especially true since the system of free expression ordained by the First Amendment is not compromised by a highly specific, narrowly tailored prohibition of physical attacks upon and destruction of the flag. Indeed, before *Texas* v. *Johnson*, individual Members of the Court had expressed the view that the government could constitutionally outlaw physical destruction of the flag consistently with the First Amendment. See *Spence* v. *Washington*, 418 U.S. at 416-423 (Rehnquist, J., joined by Burger, C.J. and White, J., dissenting); *Smith* v. *Goguen*, 415 U.S. at 586-587 (White, J., concurring in the judgment); *id.* at 590 (Blackmun, J., joined by Burger, C.J., dissenting); *id.* at 591-604 (Rehnquist, J., joined by Burger, C.J., dissenting); *Street* v. *New York*, 394 U.S. at 604-605 (Warren, C.J., dissenting); *id.*

[32] For those reasons, the Flag Protection Act is not unconstitutional on its face given Congress's focus on outlawing physical destruction of the American flag—an argument raised below that neither district court had occasion to address. See 89-1433 J.S. App. 15a n.9; 89-1434 J.S. App. 2a, 15a.

Nor is the statute subject to a successful facial challenge on vagueness or overbreadth grounds. As appellees' own conduct shows, see pp. 14-17, *supra*; J.A. 46-67, 74-84, the Flag Protection Act is certainly drafted in "terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 578 (1973); see *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). And, the statute is not overbroad. Each of the acts proscribed by Congress involves conduct that poses a significant risk of physical damage to an American flag and hence a risk of tarnishing the value of that unique national symbol.

at 609-610 (Black, J., dissenting); *id.* at 615 (White, J., dissenting); *id.* at 615-617 (Fortas, J., dissenting). Informed by this Court's prior expressions, and mindful of the nature of the Texas statute, Congress sought narrowly to craft the statute so as to fit the statutory prohibition squarely within these pre-*Johnson* expressions. These expressions—and Congress's considered judgment—reflect the Court's historic sensitivity to an act of physically destroying or mutilating the flag.[33]

These cases call for the Court to reconsider the *Johnson*-created assumption that flag burning is a form of expressive conduct meriting full First Amendment protection. Reconsideration of that premise is particularly appropriate where, as here, the people's elected representatives—the Congress and the President—have made the considered decision that the physical destruction of the flag is—uniquely—anathema to the Nation's values. See pp. 44-45, *infra*.

---

[33] Indeed, the Court's prior cases placed emphasis on the physical integrity of the flag. In *Spence* v. *Washington*, 418 U.S. at 406-409, 414-415, the Court spoke at length to the care with which the defendant respectfully treated the flag (in terms of its physical integrity). See note 28, *supra*. In *Street* v. *New York*, 394 U.S. at 577-579, 581-585, 588-594, the Court examined the record meticulously in determining that Street may well have been convicted for his utterances (as opposed to the act of flag burning itself), and thus avoided passing on the propriety of proscribing flag burning as a form of protest. And in *Smith* v. *Goguen*, 415 U.S. at 572-582, the Court repaired to vagueness doctrine to invalidate the conviction there, over the dissenting opinions of, among others, Justice Blackmun, who concluded that "Goguen's punishment was constitutionally permissible for harming the physical integrity of the flag by wearing it affixed to the seat of his pants," *id.* at 591.

Regardless of whether the Court regards flag burning as presenting such serious dangers, the Article III branch should, we believe, defer to the considered judgment of the elected branches on the question of how important it is to the Nation to protect the flag from physical attack and destruction. With all respect to the Court, that is a judgment that the elected branches are particularly well suited to make. Of course, the Court must decide, as is its duty, whether the Act is constitutional—but in doing so it should not, we believe, gainsay the compelling governmental interest reflected in the passage of the Act in *Johnson*'s wake.

C. Although the act of burning an American flag, in our view, falls outside the scope of protected speech under the First Amendment, a governmental prohibition against such conduct must still withstand judicial scrutiny. As both these cases, see 89-1433 J.S. App. 2a-3a; 89-1434 J.S. App. 2a, 5a & n.3; J.A. 46-67, 74-84, and *Texas* v. *Johnson*, 109 S. Ct. at 2536-2540, vividly show, the proscribed conduct will likely be accompanied by otherwise fully protected expression. For that reason, a governmental measure designed to outlaw destruction of an American flag must be limited to achieve that specific objective and should be scrutinized to ensure that it does not unnecessarily proscribe otherwise protected expression under the First Amendment. See, *e.g.*, *Street* v. *New York*, 394 U.S. 576 (1969). The Flag Protection Act, drafted by Congress to preclude a circumscribed type of conduct—physically damaging a flag of the United States—fully ensures that only such unprotected expression will be prosecuted. And on this record, appellees can advance no colorable claim that the government filed criminal charges based on any

speech or expressive conduct other than their particular flag burning activities.

III. TO THE EXTENT *TEXAS* v. *JOHNSON* ACCORDED FLAG BURNING FULL FIRST AMENDMENT PROTECTION, THAT DECISION SHOULD BE RECONSIDERED

We recognize that our submission here is in tension with one pivotal assumption of *Texas* v. *Johnson*. Nevertheless, the Court there had no occasion to address, much less weigh for constitutional purposes, the sort of *Congressional* determination regarding the need to protect the physical integrity of the American flag that led to enactment of the Flag Protection Act. For the reasons detailed above, see pp. 25-41, *supra*, neither *Texas* v. *Johnson* nor the First Amendment should foreclose the United States from prosecuting appellees for flag burning in violation of the new statute. However, to the extent that the Court in *Johnson* accorded flag burning, as expressive conduct, full First Amendment protection—as the courts below construed that decision, see 89-1433 J.S. App. 15a-16a; 89-1434 J.S. App. 14a-15a, and as appellees urge before this Court, see Appellees' Mem. 4-5, 12—*Texas* v. *Johnson* should be reconsidered and, upon reconsideration, appropriately limited.

A. We recognize that the principle of *stare decisis* serves important purposes in our legal system. It promotes the evenhanded, predictable, and consistent development of legal principles. The doctrine also fosters reliance on judicial rules, and contributes to the fact and appearance of integrity in our system of law. See, *e.g.*, *Vasquez* v. *Hillery*, 474 U.S. 254, 265-266 (1986); *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (plurality opinion). Those

considerations must be given due weight in this as in any other area of the law.

Nonetheless, as Justice Frankfurter explained, "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940). Moreover, it is well established that *stare decisis* has less force in constitutional adjudication, where, short of a constitutional amendment, this Court is the only body capable of effecting a needed change. See *Monell* v. *Department of Social Services*, 436 U.S. 658, 696 (1978); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 543 (1962).

Although this Court has never adopted a "rigid formula" for determining when a prior construction of the Constitution should be overruled, *Vasquez*, 474 U.S. at 266, it has identified several factors that bear on this inquiry. One factor is whether the prior ruling is inconsistent with basic assumptions about the nature of the Constitution or established methods for giving effect to its key provisions. See *Garcia* v. *San Antonio Metro Trans. Auth.*, 469 U.S. 528, 547-555 (1985); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943). The Court has also stated that prior decisions, even if of fairly recent vintage, should be reconsidered if they "disserve[] principles of democratic self-governance." *Garcia*, 469 U.S. at 547. Taken together, these factors strongly suggest that an underlying premise of *Texas* v. *Johnson*—that flag burning is subject to full First Amendment protection—should be abandoned.

B. First, the *Johnson* Court assumed that flag burning is the sort of expressive conduct fully protected by the First Amendment without having the benefit of (and an occasion to consider) the representative consensus articulated by the Congress and the President in connection with enactment of the Flag Protection Act of 1989. See *Texas* v. *Johnson*, 109 S. Ct. at 2538-2540, 2545-2546. And *Johnson* embraced that fundamental premise even though prior precedent did not compel that legal conclusion. To the contrary, the Court's prior decisions had by no means held that the First Amendment applied with full force to the physical destruction of the flag itself, as opposed to otherwise protected speech incident to such conduct. See *Spence* v. *Washington*, 418 U.S. 405, 414-415 (1974); *Smith* v. *Goguen*, 415 U.S. 566, 582-583 & n.32 (1974); *Street* v. *New York*, 394 U.S. 576, 594 (1969); notes 28 and 33, *supra*.

But through passage of the Flag Protection Act, the people's elected representatives have now made clear that the physical integrity of the flag of the United States, as the unique symbol of the Nation, merits protection not accorded other national emblems. And that representative consensus identifies the substantial potential harm posed by physical damage and mistreatment of the American flag—the assault upon and injury to the shared values that bind our national community. Upon reflection, therefore, the assumption so newly and narrowly embraced in *Johnson* should not now obliterate Congress's considered—and limited—legislative determination of the compelling need to protect the physical integrity of the American flag.

Second, according flag burning full First Amendment protection may well "disserve[] principles of

democratic self-governance." *Garcia*, 469 U.S. at 547. Although the verbal expression associated with such activity plainly merits constitutional protection, see *Street* v. *New York*, *supra*, the physical conduct itself—admittedly expressive conduct—is "no *essential* part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire*, 315 U.S. at 572 (emphasis added). In short, the physical integrity of the unique symbol of the Nation—the flag of the United States—is an aspect of those "fundamental values necessary to the maintenance of a democratic political system." *Bethel School Dist. No. 403* v. *Fraser*, 478 U.S. at 683. Congress has the power—consistent with the First Amendment—to safeguard that symbol from destructive "act[s] of mindless nihilism." *Spence* v. *Washington*, 418 U.S. at 419. That is particularly so where, as here, Congress has left entirely in place abundant opportunities, as opposed to imposing "an *absolute* ban on all forms" (*Austin* v. *Michigan Chamber of Commerce*, slip op. 7 (emphasis in original)) of expressive conduct involving the flag, for individuals to engage in robust, wide-open, and uninhibited debate.

CONCLUSION

The judgment of the district court in *United States* v. *Eichman*, No. 89-1433, and the judgment of the district court in *United States* v. *Haggerty*, No. 89-1434, should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

MICHAEL R. LAZERWITZ
Assistant to the Solicitor General

APRIL 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 282203 653